CTAP CASELAW UPDATES[1] – JUNE 2008

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Planning, Zoning And Subdivision Law

Mills v. Alta Vista Ranch, LLC (Montana Supreme Court, 2008 MT 214, on appeal from the District Court of the Eighteenth Judicial District of Montana, Gallatin County, June 17, 2008)

Summary: Montana Supreme Court holds that certificates of surveys creating one or more parcels of land containing less than 160 acres must either meet one of the specified exemptions in the Act or undergo subdivision review.

Over a period of a few months in 2004, defendant filed successive certificates of surveys, each dividing an existing tract of land into two parcels; one greater than 160 acres, and the other a "remainder" parcel less than 160 acres. These "remainder" parcels ranged in size but were generally 5-10 acres, and all were located along an access road with the appearance of a typical subdivision. Plaintiffs did not claim any exemption from the Montana Subdivision and Platting Act (MSPA) for any of the surveys; instead, they posited that each division was not subject to the MSPA because the tract being created was greater than 160 acres. (*See* § 76-3-101, MCA.)

After recording the surveys, the County Clerk and Recorder sought declaratory judgment, arguing that the divisions illegally avoided subdivision review under the MSPA. The district court granted summary judgment for the defendant, agreeing that the tracts were not subject to subdivision review and the "remainders," or their later transfer, were not divisions of land subject to the MSPA.

The Montana Supreme Court reversed, holding that the MSPA is clear and unambiguous – if a certificate of survey creates one or more parcels containing less than 160 acres, that division must either be subject to subdivision review or exempt from review pursuant to the MSPA. The Court flatly rejected the existence of the so-called "remainder doctrine," noting that under such a doctrine, all land divisions in Montana would evade review under the MSPA so long as a tract over 160 parcels was simultaneously created. The Court refused to "insert what has been omitted" from the MSPA by allowing for the creation of remainder parcels less than 160 acres outside of subdivision review or exemption. Because the defendants' divisions did not meet one of the exemptions, they were subject to subdivision review.

[1] Disclaimer – This information is not intended to constitute legal advice and should not be relied upon or used as a substitute for consultation with your own, your agency's, or your organization's licensed attorney. These case summaries are provided as technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state and to assist local governments in discharging their responsibilities.

Note: CTAP's position is that this case, as the court specifically indicates, does not announce any "new judicial principle, but rather applies the plain language of the statute." Therefore, this case should not be relied on to require divisions that are specifically exempt under any provision of the MSPA to go through subdivision review, regardless of the size of parcels created under that exemption. The Court cites § 76-3-201, but other exemptions are found in 202 through 210, and there is no reason to differentiate for purposes of this decision. In fact, the Court expressly relied on the existence of specific exemptions in the MSPA in holding that the "remainder doctrine" is not one of them. The case merely clarifies that if a division does not meet an exemption, and creates a parcel less than 160 acres, it must undergo subdivision review.

Westre v. Ravalli County Clerk & Recorder (Montana District Court, Twenty-First Judicial District, Ravalli County, June 19, 2008, Hon. Jeffrey Langton Presiding)

Summary: The District Court upheld a county clerk and recorder's refusal to record legal descriptions for parcels created by a landowner who filed an application to create five parcels of land out of a 10-acre lot using a mortgage exemption and two quitclaim deeds.

Plaintiff Westre obtained title to Lot 2 of the Sunnyside Meadows subdivision (the Property), upon which his cousin had previously filed five mortgage exemptions pursuant to mortgages obtained to finance construction of condominiums on the Property. The legal descriptions of all five mortgage exemption parcels within the Property contained language prohibiting the land from being conveyed.

At some point, Westre's cousin deeded Lot 2 to Westre, without any exchange of money. The plaintiff thereafter obtained additional mortgages on the Property to fund further construction thereon. When the mortgages came due, Westre arranged to sell the mortgage exemption parcels to fulfill the liens. None of the parcels had ever been subjected to foreclosure during Westre or his cousin's ownership. The Ravalli County Clerk and Recorder refused to record the deeds transferring the property to the intended purchasers, and Westre sued to force their recordation, arguing that the pre-2003 version of the mortgage exemption and a 1988 attorney general opinion interpreting that statute rendered the parcels legally transferable.

Judge Langton disagreed, holding that in the 1988 Attorney General's opinion, the Attorney General opined that a mortgage exemption parcel would not exist after the extinguishment of the lien, because "the mortgage exemption from the MSPA's requirements for the division of land would not exist apart from the division of land or after its purpose had been fulfilled." Since in this case there was no transfer of any portion of Lot 2 to a lienholder, and all the liens had already been extinguished, the mortgage exemption parcels no longer existed.

As for Westre's claim that the pre-2003 mortgage exemption allowed for the unrestricted transfer of title to a parcel created as security, the court held the plain language of the statute establishes that the purpose of the mortgage exemption is to provide security for a construction loan, not to create transferrable parcels.

Finally, the Court rejected Westre's claim that Ravalli County's subdivision regulations do not govern mortgage exemptions. The Court noted that Ravalli County did have regulations in

effect to review mortgage exemptions when lot 2 was divided into parcels, and that the County's evasion criteria regarding mortgage exemptions noted that "property created by construction mortgage shall not be transferred other than to the mortgage or trust beneficiary."

Note: The Banking and Financial Institutions Division of the Montana Department of Administration maintains a current list of all banks, trust companies, credit unions, mortgage brokers and loan originators licensed to do business as a lending institution in the state of Montana. The list can be accessed at http://banking.mt.gov/licensees.asp.

52 Op. Atty. Gen. No. 6 (2008) (Montana Attorney General Opinion from Attorney General Mike McGrath, June 23, 2008)

Summary: The Attorney General held that the "qualified voters" for county zoning regulation initiatives effective in all unincorporated areas of a county are all residents of that county, including those residing within incorporated cities and towns.

In April 2006, the Ravalli County Board of County Commissioners enacted an interim zoning resolution, pursuant to Mont. Code Ann. § 76-2-206, limiting the size of "large scale retail sales and retail services establishments to no more than 60,000 square feet" in all of the unincorporated area of Ravalli County, Montana.

Later that year, two citizen-sponsored initiatives were proposed by the County. One sought to repeal the "big-box" resolution, and another sought to implement a new interim zoning regulation limiting subdivision density to one residence per two acres for all unincorporated areas of Ravalli County. After both initiatives gathered enough signatures to be on the ballots, the Ravalli County Attorney opined that only residents of the unincorporated areas of Ravalli County could vote on the initiatives. The City Attorney for the City of Hamilton disagreed with the county attorney's opinion, concluding that all county residents have a right to vote on county zoning initiatives, including voters residing in incorporated areas. The Hamilton City Attorney requested an opinion from the Attorney General regarding which body of "electors" constitute "qualified voters" for county zoning initiatives.

The Attorney General agreed with the Hamilton City Attorney. In his decision, the Attorney General noted that the Montana Constitution directs the legislature to extend the initiative and referendum powers to the "qualified electors of each local government unit." Mont. Const. art. XI, §8. This includes "any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law." Mont. Const. art. XI, § 1. The "local government unit" is then further defined as including, but not limited to, "counties and incorporated cities and towns." Mont. Const. art. XI, § 1.

The Attorney General noted that since the statute authorizing county zoning (so-called "Part 2" zoning) contains no provisions regarding citizen initiatives, such initiatives are subject to the general initiative provisions found in Sections 7-5-131, MCA, *et seq*. Section 7-5-131(1), MCA, limits citizen initiatives to actions within the legislative power of the local government , and the

signatures on initiative petitions includes the number of individuals registered to vote "at the preceding general election for the local government."

Since other statutory sections dealing with land use regulations, such as transportation districts (§ 7-14-2507, MCA), conservation districts (§ 76-15-207, MCA), and irrigation districts (§ 85-7-1710, MCA) limit the definition of qualified voters on a citizen initiative to those residing in the district, the Attorney General found the lack of a similar provision in the county zoning statute to evidence the intent of the Legislature to not limit the qualified voters for county-wide zoning regulation initiatives.

Finally, the Attorney General noted that "financial, social, and environmental" pressures of county zoning regulations can have a direct affect on both city and county governments and their citizens.

City of Whitefish v. Board of County Commissioners of Flathead County (Montana District Court, Eleventh Judicial District, Flathead County, May 1, 2008, Hon. Katherine R. Curtis presiding)

CORRECTION: **Please note the district court did <u>not</u> hold the interlocal agreement was unconstitutional, but rather discussed the substantive claims of the parties only in the context of denying the City's request for a preliminary injunction against the agreement. Please read the summary in light of that distinction.**

Summary: The Eleventh Judicial District Court held that a voluntary Inter-local Agreement entered into by the City of Whitefish and Flathead County establishing the City's extraterritorial zoning jurisdiction was unconstitutional as an unreasonable restriction of the County's powers reserved to it by the legislature, and could be rescinded by the County despite a provision in the agreement requiring the consent of both parties to rescind the contract.

Note: This is a District Court case from May, 2008. Since it has been appealed to the Montana Supreme Court, it does not have any precedential value until the Supreme Court resolves the case.

Beginning in 1967 and continuing until 2005, Whitefish and Flathead County cooperated in creating and administering the Whitefish City-County Planning Board. The parties agreed, in joint resolutions, to Planning Board boundaries extending four and one-half miles from the City, and jointly adopted a master plan for the city and four and one-half mile Planning Board jurisdiction.

On February 5, 2005, Whitefish and the Board entered into an Inter-local Agreement pursuant to Section 7-11-104, MCA. The agreement provided for jurisdiction of the Whitefish City-County Planning Board and Whitefish growth policy to two miles outside of the City limits, which gave the City the sole power to: (1) establish or alter zoning and planning regulations; (2) approve subdivisions and administer subdivision regulations; (3) consider and approve lakeshore permits and regulations; and (4) consider and approve floodplain permits and regulations within the two mile radius.

The agreement further provided that the City retained the authority to update the growth policy within the two-mile area, while the County retained the authority to update the growth policy outside of the City's new jurisdictional area. The jurisdictional areas of the agreement could only be modified upon a joint determination by the parties, and the agreement could not be waived, altered, amended, repealed, or terminated, except with the written consent of both parties for the agreement, which expired only upon mutual termination. On September 20, 2005, the parties added an amendment to the agreement, which provided that until Flathead County removed its zoning designation and the City established new designations, the County zoning regulations remained in effect, and the City had full legal power and authority to enforce those regulations.

Following the agreement and the City's adoption of a growth policy for its entire planning jurisdiction—including the two-mile jurisdictional area—the Flathead County Commissioners adopted a resolution in response to the City's new zoning ordinances that rescinded its consent to the 2005 agreement with Whitefish. The City of Whitefish sued to enforce the agreement and to prevent the County from adopting land use regulations within the two-mile area.

Judge Curtis conducted a broad overview of Montana law and inter-local agreements, noting that Article XI, Section 7 of the Montana Constitution and Section 7-11-104, MCA provide broad grants of authority for a city and county to enter into agreements not "prohibited by law or charter." The Court recognized that Montana law encourages local governments to enter into inter-local agreements. (43 Op. Atty Gen. Mont. No. 56, at p.14 (1990); and 37 Op. Atty Gen. Mont. No. 117, at p.503 (1978).)The Court also recognized that State law provides broad discretion for cities and counties to cooperate in the provision of land use and planning services, including the types of jurisdictional agreements between Whitefish and Flathead County. Section 76-2-310(1), MCA, further allows a city of the second class (which includes Whitefish) to extend its zoning and subdivision regulations for two miles beyond its City limit and enforce such regulations as if the land were in the city's jurisdiction "except in locations where a county has adopted subdivision regulations."

Nevertheless, the Court reasoned that an injunction to enforce a contract cannot be granted to prevent the breach of a contract if its performance is not mutually capable of specific performance. Section 27-1-414(2), MCA. Because Flathead County could not force the City to exercise extra-territorial jurisdiction, the agreement was not capable of specific performance and no injunctive relief could be granted. The Court further opined that an injunction is no available to "prevent the execution of a public statute by officers of the law for the public benefit.".

The Court reasoned that the legislature intended Sections 76-2-310 and -311, MCA, governing extraterritorial zoning, to allow the County to retain the ability at "some point in time" to adopt a growth policy, zoning, and subdivision regulations in an extra-territorial area rendered the County's voluntary restriction of its own powers reserved to it by the statutes is prohibited by law.

Eminent Domain

U.S. v. Campion (9th Circuit Court of Appeals, CV-03-06064-AWI/LJO, on appeal from the United States District Court for the Eastern District of California, June 24, 2008.)

Summary: Landowner who won a lawsuit against the U.S. for approximately $2 million over the construction of a power line in an eminent domain action across his property was not prejudiced when the federal district court did not allow his expert to testify regarding the extent and level of EMFs from the line that reach beyond the easement into the rest of his property.

The plaintiff, a landowner named Campion, owns 3,220 acres of land in Merced County, California. Acting on behalf of the Department of Energy and Western Area Power Administration, the United States filed an eminent domain action to acquire a right of way easement across the land for a 500kV power transmission line called the Path 15 line, which was operational at the time of the lawsuit.

The Path 15 line rests on a 200-foot-wide easement running for approximately three miles across Campion's land, covering 88 acres. The line is supported by 13 steel towers ranging in height from 130 to 190 feet, and branching out 40 feet on two sides. Like other live power lines, the Path 15 line generates electromagnetic fields (EMFs) that radiate from the line, and sometimes emits crackling and buzzing sounds. Though no scientific evidence links EMFs to effects on nearby residents, the court noted there is a "generally acknowledged public perception that EMFs cause health problems."

When the easement was taken on Campion's land, the property was undeveloped and used for agricultural purposes. The government's appraiser valued Campion's entire property at $3.075 million for agricultural purposes, testified that the line caused no diminution in value to the use of the remaining property, and recommended that the government pay Campion $76,518 for the taking of the easement. However, before the taking occurred, Campion had begun creating plans to develop part of the land for residential use, a golf course, a community village center, and public facilities. His expert appraiser put the pre-taking value of the land at $19.320 million, and testified that the transmission lines diminished the value of the land outside of the easement for residential and commercial development.

The trial court refused to allow Campion's expert to as to the extent and level of EMFs from the Path 15 line that reach beyond the easement into the rest of Campion's property. The trial judge permitted the expert to testify only to public perceptions. Campion challenged the exclusion of testimony in his appeal. Nevertheless, the jury awarded Campion over $2 million for the taking of the easement and severance damages for its effect on the remaining property. Campion appealed the trial court's exclusion of its expert's testimony as to the EMF levels on the remaining portions of the property outside the easement.

The Court noted that public perceptions of health risks—even if they are irrational—may establish an impact on market value based on what subsequent buyers think of the change to the property. Under either Rule 403 or 703, F.R. Civ. P., evidence of EMF levels and locations was properly excluded as having little probative value, and being highly prejudicial to the

defendant. The court then notes that the expert's testimony about the levels of EMFs could mislead or confuse a jury, and may invite unsupported inferences about the adverse effects of EMFs, which no scientific tests have proven.

United States v. Sawyer (9th Circuit Court of Appeals, on appeal from the Eastern District of California, CV-03-06019-REC/LJO, June 24, 2008.)

Summary: The 9th Circuit Court found that the Secretary of Energy is authorized to condemn property interests to construct a power transmission line between Northern and Southern California, and such a transmission line qualifies as a "public use" under the Takings Clause of the Fifth Amendment to the U.S. Constitution, despite the fact that the beneficiaries are largely customers of private energy companies.

In 2003, the United States began condemnation proceedings in district court on behalf of WAPA to acquire easements on approximately 14.02 acres of land in western Fresno County, California for the same Path 15 transmission line at issue in *US v. Campion*. Sawyer, one of the property owners across whose property the easement would run, challenged the condemnation by asserting eight affirmative defenses. The government moved to strike the affirmative defenses or, in the alternative, for judgment on the pleadings for its authorization to take. The district court granted the government's motion, concluding that "WAPA was fully authorized by federal law to construct the Path 15 Project and to condemn the power line transmission easements for it." One year later, the parties filed a joint statement in which they agreed that the value of the easement taken was $7,374.32, and the district court granted summary judgment in favor of the government. Sawyer appealed, challenging whether the purpose for which the property was taken was for a "Congressionally authorized public use."

The appellate court noted the "public purpose" inquiry has two prongs: (1) that the Secretary of Energy and Administrator of WAPA enjoy statutory authorization to condemn property interests to construct the Path 15 Upgrade; and (2) whether the Path 15 Upgrade qualifies as a "public use" under the Takings Clause of the Fifth Amendment.

Under the first prong, the Court held that when Congress mandates the construction of a new high-voltage transmission line and appropriates funds to carry it out, it implies the authority on the part of the executing agency (WAPA) to acquire land on which the transmission line may be constructed. In addition, it is within the discretion of the Secretary of Energy to determine if the construction of power transmission lines is necessary.

Under the second prong of the public purpose inquiry, the Court found that the Path 15 Upgrade did not violate the Constitution, even though the beneficiaries of the project are arguably the customers of privately-owned utilities, as opposed to the public at large. The Court relied on *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) and other authorities for the proposition that the Supreme Court's public-use jurisprudence has favored broad readings of what constitute a public use. In this case, the minimal public-private transfer serves the broader values of allowing the Pacific Northwest to arrange mutually beneficial power transfers with California, and the Court refused to debate the wisdom of either increased access to electricity, or the Path 15 Upgrade.

K&R Partnership v. City of Whitefish (Montana Supreme Court, 2008 MT 228, June 25, 2008, on appeal from the Eleventh Judicial District.)

Summary: In 1998, the City of Whitefish and a landowner in Whitefish entered into an agreement through which the City of Whitefish acquired 7,234 square feet of a business owner's property to build a road, and in exchange provided the business 10,175 square feet of its vacant lot bordering the property and $130,000. The contract stated that the parties disagreed on the value of the property, the severance damages, and the value of the property taken. The Supreme Court overturned many holdings of the district court in its interpretations of the contract, holding that: (1) prior payments made by the City to the landowner should have been admitted into evidence; and (2) reasonable constraints should have been placed on the property owner's opinion testimony as to the value of his property.

K&R, a partnership consisting of four families, owns real property in Whitefish. The property hosts a 7,400 square foot commercial building that houses a restaurant and casino. In 1995, the State was in the process of widening Highway 93 to four lanes, and Whitefish wanted to run connector streets from Highway 93 to a street running parallel to Highway 93 bordering the property. To do this, Whitefish proposed to use another street as a connector to the highway by condemning 7.234 square feet of K&R property. The construction of the road would eliminate K&R's parking lot on the south side of its building, but also would provide K&R's business with direct access to another street, and an alternate route to and from Highway 93.

K&R and Whitefish entered into an "Agreement and Grant of Possession" (Agreement). The Agreement provided that K&R would grant Whitefish possession of approximately 7,000 square feet of K&R property (the Condemned Property), and Whitefish would pay K&R $130,000, as well as convey 10,175 square feet of its vacant lot bordering the west side of the Conveyed Property to K&R. Whitefish also agreed to pave the Conveyed Property so K&R could use it for parking. The Agreement also stated that the parties were unable to agree on: (1) the value of the Condemned Property; (2) the severance damages to the remaining K&R property; and (3) the value of the Conveyed Property. As a result of these disagreements, K&R filed a complaint for inverse condemnation and breach of the Agreement.

Prior to the jury trial, the District Court decided that the only issue for the jury to determine was the amount K&R was entitled to as compensation for the land taken, holding that the prior $130,000 payment was made towards severance damages. Based on this interpretation of the agreement, the court granted K&R's motion to preclude Whitefish from admitting evidence that the money paid by Whitefish to K&R Partnership was also for just compensation for the Condemned Property. The jury determined that Whitefish owed K&R an additional $161,000 as compensation for the Condemned Property, and granted K&R $15,833 in damages for Whitefish's breach of the Agreement, in addition to $94,788.23 as litigation expenses. Whitefish paid the $15,833 for the breach of agreement, and appealed all the other damages awarded to K&R.

The Montana Supreme Court noted that the contract was very clear—that both sides were unable to determine the valuation of the Condemned Property, severance damages, and the value of the Conveyed Property, and the right to litigate those damages was preserved by both parties. In addition, the $130,000 provided by K&R to Whitefish was clearly what Whitefish

agreed to be the "the full value of both the Condemned Property and all severance damages," which Whitefish was allowed to offset. As a result, the Court ordered a new trial on this issue, and clarified further issues to aid the district court on remand.

The Supreme Court also determined that the district court should have restrained K&R from testifying about the value of the property taken for eminent domain purposes by comparison to other property sales. The "landowner-witness rule" allows a landowner to "estimate in a reasonable way the value of his property for the use to which he has been putting it." *State Dept. Highways v. Schumacher*, 180 Mont. 329, 337, 590 P.2d 1110, 1115 (1979). In their testimony, K&R analyzed the value of the surrounding property and its recent sales to arrive at a figure of $21 to $25 per square foot, which was much higher than its own valuation of the property at $12.50 per square foot. As a result of its holdings, the Supreme Court vacated the award of litigation expenses, while reaffirming that litigation expenses must be awarded in inverse condemnation cases where the condemnee prevails pursuant to § 70-30-305, M.C.A. (1997), and remanded the case back to the District Court.

Environmental Law

The Lands Council, et. al. v. Martin, et. al. (9th Circuit Court of Appeals, on appeal from the United States District Court for the Eastern District of Washington, CV-06-00229-LRS, June 25 2008.)

Summary: Plaintiffs successfully halted logging of burned timber in two uninventoried roadless areas of the Umatilla National Forest in Oregon in violation of the National Environmental Policy Act (NEPA) because the Environmental Impact Statement (EIS) prepared by the Forest Service did not contain an adequate discussion of the effects of the proposed logging on the roadless character of the two areas.

In August 2005, a forest fire named the "School Fire" burned approximately 51,000 acres in southeastern Washington, including 28,000 acres of the Umatilla National Forest. After the fire, the Forest Service (USFS) began a process to harvest trees located within the burned areas of National Forest lands. After two rounds of public comments, USFS released a final EIS and issued a decision to log 9,423 of the burned acres, none of which would occur on inventoried roadless areas. However, the logging would occur on portions of two uninventoried roadless areas, known informally as the West Tucannon and Upper Cummins Creek roadless areas. Because trees damaged or destroyed by fire depreciate in value quickly, the USFS Chief issued an Emergency Situation Determination pursuant to 36 C.F.R. § 125.10 in 2006 authorizing it to immediately log in three designated areas to avoid a "potential loss of value of $1,547,000 to the Federal Government."

One day after the decision was issued, Plaintiffs filed suit, alleging violations of NEPA and National Forest Management Act (NFMA). The district court denied plaintiffs' motion for a temporary restraining order and preliminary injunction and plaintiffs appealed. A divided three-judge panel of the 9th circuit denied plaintiffs' emergency motion for an injunction pending appeal, and the logging operation commenced. The 9th Circuit Court addressed the motion again, and reversed the district court's denial of a preliminary injunction on Plaintiffs' NFMA

claim concerning the Forest Service's interpretation of "live trees" in the Forest Plan's "Eastside Screens" section, which prohibits the harvesting of old growth, "live" trees. The Court agreed with Plaintiffs' argument that the Forest Service's proposed logging of dying trees violated the Eastside Screens because, they reasoned, dying trees are still alive.

On remand, USFS released a final Supplemental Environmental Impact Statement (SEIS), which added a definition of "live trees" that excluded dying trees. USFS limited the scope of the amendment to the geographic area, and for the duration, of the School Fire Salvage Recovery Project. The Forest Supervisor further explained that the amendment was chosen because the common meaning of "live trees" did not "reflect USFS silvicultural practice and interpretation, and deters USFS from achieving the purpose and need of the School Fire Salvage Recovery Project." Finally, the Forest Service issued a second Emergency Situation Determination permitting logging under the amended Eastside Screens in four timber sales areas.

The district court granted summary judgment to Defendants on all claims and plaintiffs appealed. Plaintiffs challenged three aspects of the School Fire Salvage Recovery project: (1) the new definition of "live trees" in the Eastside Screens; (2) the soil analysis in the EIS; and (3) the discussion of roadless areas in the EIS.

The Court dismissed the Plaintiffs' first challenge to the new definition of "live trees," holding that USFS provided a reasonable explanation when it amended the definition of live trees, despite affidavits from respected scientists in the field asserting that the new definition of "live trees" is not supported by science. The Court also noted there is no legal requirement for a methodology to be peer-reviewed or published in a credible source, and that no congressional definitions, statutory or otherwise, suggest that a previously undefined technical term in a forest plan can never be clarified through amendment of a forest plan. Finally, the Court decided that USFS' decision to limit the scope of the amendment to this particular salvage project was reasonable.

The Court also rejected the plaintiffs' argument that the soil analysis in the EIS was deficient, finding the term "severe burning" in a provision of the forest plan as applicable only to management-induced burns, not forest fires. Finally, the court dismissed the plaintiffs' argument that USFS impermissibly used the "long-term average annual prediction" method instead of Plaintiffs' preferred "return period analysis for soil erosion," holding the USFWS' decision to use the former method was a permissible exercise of agency discretion.

The court did agree with plaintiffs that the Roadless Area Analysis in the EIS does not contain an adequate discussion of the effects of the proposed logging on the roadless character of two substantial roadless areas. Specifically, the Plaintiffs' argued that the EIS did not comply with the requirement in *Smith v. United States Forest Service*, 33 F. 3d 1072 (9th Cir. 1994), that roadless areas must be, and in this case impermissibly were not, discussed in the context of the "possibility of future wilderness classification triggers." Although the roadless areas in *Smith* contained more than 5,000 acres, the foundation for the rule—the potential for wilderness designation under the Wilderness Act—demonstrated the application of the rule with equal force to roadless areas "of sufficient size as to make practicable its preservation and use in an unimpaired condition."

Coos County Board of County Commissioners v. Kempthorne, et. al. (9th Circuit Court of Appeals, CV-06-06010-MRH, on appeal from the United States District Court for the District of Oregon, June 26, 2008.)

Summary: Upholding summary judgment for the Fish, Wildlife and Parks Service against an Oregon county that challenged the continued listing of the tri-state marbled murrelet as an endangered species.

In 1988, the National Audubon Society petitioned the U.S. Fish and Wildlife Service (USFWS) to list only the California, Oregon, and Washington population segment of the marbled murrelet (the "tri-state murrelets") as a threatened species under the Endangered Species Act (ESA). After the tri-state murrelets were listed as threatened, and before the statutory Five-Year Review of the listing, USFWS promulgated a policy defining characteristics of "distinct population segments" (DPS) for the purposes of the ESA. In the DPS Policy, the agency created a two-step process to determine whether a population qualifies as a DPS. USFWS first asks if the population is "discrete" with regard to "the remainder of the species to which it belongs," and, if the population is discrete, inquires into the "significance" of the population as a whole. A species can be discrete even if not separated from other members of its species by physical or ecological barriers, if "delimited by international governmental boundaries within which differences in control of exploration, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of 16 U.S.C. § 1533(a)(1)(D), which addresses the inadequacy of existing regulatory mechanisms to protect the species"

USFWS understood that earlier distinct population segment determinations might not satisfy the new DPS policy, and so announced that those animals must be re-evaluated, and considered in the statutory Five-Year Review of all listed species. The murrelet review was delayed for several years, until a timber industry group and several lumber companies filed suit, arguing that USFWS failed to comply with a mandatory duty to review the tri-state population listing. The agency thereafter completed a summary review, finding that the tri-state murrelet population is still threatened, and none of the delisting criteria from the Recovery Plan have been met.

In response to the review findings, Coos County sued USFWS, arguing the agency's decision to continue protecting the murrelets, at least pending the completion of a fuller review, had been made "without explanation or authority." The County alleged that: (1) since the USFWS determined the tri-state murrelets were not a distinct population segment, the agency should have concluded that the species were not protected by the ESA; (2) the five-year review process is governed by the deadlines normally associated with citizen petitions, including the "promptly publish" obligation of 16 U.S.C. § 1533(b)(3)(B)(ii); and (3) FWS' determination in the Five-Year Review that the tri-state murrelets were not a distinct population segment thus triggered a judicially-enforceable duty to promptly publish a proposed rule delisting the murrelets and then, within a year, a final rule doing so.

The Court disagreed with the County, holding that the Five-Year Review provision does not contain any explicit publication deadlines, and applying the rigorous criteria of the deadlines, such as making ninety-day findings for the Five-Year Review, would lead to unintended conclusions that separate the distinct natures of the petition and five-year review processes.

Real Property Law

El Dorado Heights Homeowners' Association v. DeWitt, et. al. (Montana Supreme Court, 2008 MT 199, on appeal from the District Court of the First Judicial District, Lewis and Clark County, June 10, 2008.)

Summary: A homeowner built a barn roof in violation of homeowners' association covenants and later entered into a stipulation, on the advice of counsel, that became a court order allowing her to continue building the structure on the condition that she remove the roof. After she refused to remove the roof on the advice of another attorney, she was found by the Supreme Court to be in criminal contempt and the homeowners' association was properly awarded costs and attorney's fees when it had to file suit to enforce the original court order.

On May 16, 2006, the El Dorado Heights Homeowners' Association (HOA) filed a complaint in District Court requesting temporary and permanent injunctive relief, including a temporary restraining order, to prohibit defendant property owners from continuing construction on a lot within the El Dorado Heights subdivision. The HOA claimed that the construction plans violated the restrictive covenants and Architectural Guidelines of the subdivision, including the use of prohibited materials and colors on proposed buildings, and improper setbacks from the road. The complaint requested costs and attorney's fees. Thereafter, the HOA representatives and property owner Diane Boles reached an agreement in which Boles submitted a new building plan that satisfied the covenants. In exchange for Boles' promise to remove the red metal barn roof, the HOA agreed to make Boles the chairperson of the HOA working group that would be reviewing and possibly amending the covenants through a vote of the membership. The parties memorialized their agreement in a stipulation, which became a court order.

Despite her agreement with the HOA, Boles moved to substitute counsel and sought a stay and amendment or rescission of the stipulation. She filed a brief and several affidavits of various professionals, including homeowners within El Dorado Heights, to support her various contentions, including: that her counsel was ineffective; her roof did not violate the covenants; and the covenants would be changing soon to allow for the roof, and thus Boles would be forced to endure needless, significant financial loss if she were forced to remove the roof.

In a court order dated January 3, 2007, the court denied Boles' motion to rescind the stipulation, and ruled in favor of the HOA on its civil contempt claim, awarded attorney's fees under its equitable powers under § 3-1-501(3), MCA, and ordered the roof to be removed, and that Boles incur a $300 fine per day for each day past the court's deadline that the roof was not removed. Boles appealed the order to the Montana Supreme Court.

The Supreme Court struck Boles' lack of personal jurisdiction defense, ruling that it must be raised at a defendant's initial appearance or response (which was not done), and that Boles consented to the court's jurisdiction in her filings. It also rejected her defense that the HOA coerced her into signing the stipulation under the guise of changing the covenants, and further agreed with the HOA that the covenants prohibited metal roofs and the stipulation was valid and based on mutual consideration.

Although the Court struck the $300 per day sanction as a violation of § 3-1-520, MCA, which limits a sanction imposed for a contempt that seeks to compel a person to perform an act within her power to $500, the Supreme Court upheld the District Court's award of attorney's fees under its equitable powers. It also held Boles in criminal contempt, not civil contempt, as the district court found, and imposed criminal penalties under the equitable exception allowing an award of attorney's fees in the absence of a contract or statutory basis charged for services occurring after August 31, 2006, when the HOA was forced to defend Boles' rescission of the stipulation signed by both parties in the case.

Tribal Law

Plains Commerce Bank v. Long Family Land & Cattle Co., et. al. (United States Supreme Court, 491 F.3d 871, June 25, 2008)

Plaintiffs, the Long Family Land and Cattle Company, Inc. (Long Company), own a cattle ranch located on the Cheyenne River Sioux Indian Reservation. The Long family, some of who are enrolled members of the Cheyenne River Sioux Indian Tribe, together owned at least 51% of the company's shares. The Long family were customers of the Plains Commerce Bank (Bank), located 25 miles off the reservation in Hoven, South Dakota. The bank made its first commercial loan to the Long Company in 1989, and more agreements followed. As part of the agreements, the Long Company mortgaged 2,230 acres of fee land to the bank that they owned inside the reservation. At the time of the family patriarch's death in 1995, the Long Company owed the Bank $750,000.

In the spring of 1996, members of the Long family began negotiating a new loan contract with the Bank to improve the ranch's debt position. After months of negotiations, the parties made two agreements in December. The Company and Bank signed a fresh loan contract in which the Company deeded over the previously mortgaged fee acreage to the Bank in lieu of foreclosure. In return, the Bank agreed to cancel some of the Company's debt and make additional operating loans. The parties also agreed to a lease agreement in which the Company received a two-year lease on the 2,230 acres, deeded to the Bank, with an option to purchase the land at the end of the term for $468,000.

At this point, the Long family claimed that the bank began treating them unfairly by offering more favorable purchase terms in the agreement, proposing to sell the land back to the Longs with a 20-year contract for deed that was rescinded because of "possible jurisdictional problems" that might be caused by the Bank financing an Indian-owned entity on the reservation. A harsh winter in 1996-1997 further undermined the Longs' ability to exercise their option to purchase the leased acreage when the lease contract expired in 1998. The Longs then refused to vacate the property, which led the Bank to initiate eviction proceedings in state court, and petition the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit. In the meantime, the Bank sold 320 acres of the fee land it owned to a non-Indian couple. In June 1999, while the Longs continued to occupy a 960-acre parcel of the land, the Bank sold the remaining 1,910 acres to two other non-tribal members.

In July 1999, the Longs and Long Company filed suit against the bank in the Tribal Court, seeking an injunction to prevent their eviction from the property and reverse the sale of the land, claiming breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. The discrimination claim alleged that the Bank sold the land to non-members on terms more favorable than those offered to the Company. The bank asserted that the Tribal Court lacked jurisdiction, and counterclaimed against the Longs. The Tribal Court denied the Bank's motion for summary judgment, and proceeded to trial. The jury found for the Longs on three of the four causes, including the discrimination claim, and awarded a $750,000 general verdict plus interest, and the option to purchase the 960 acres of the land they still occupied on the terms offered in the original purchase option.

The Bank appealed the decision to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court. The Bank then filed in the U.S. District Court for the District of South Dakota seeking a declaration that the tribal judgment was null and void for lack of jurisdiction. The District Court granted summary judgment to the Longs, finding that the Bank entered into a consensual relationship with the Longs and the Long Company. 440 F. Supp. 2d 1070, 1077-1078, 1080-1081 (SD 2006). The District Court held that this relationship brought the Bank under the tribal civil jurisdiction over non-members outlined in *Montana v. United States*, 450 U.S. 544 (1981). Generally referred to as the "Montana rule" or the "Montana exceptions," tribes can regulate the activities of non-members who enter consensual relationships with the tribe or its members, through "commercial dealing, contracts, leases, or other arrangements," and exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544 (1981). The Bank appealed this decision to the 8th Circuit Court of Appeals, which affirmed the District Court, and the U.S. Supreme Court granted *certiorari*.

The Court discusses tribal sovereignty in terms of Supreme Court jurisprudence as "unique and limited" in character, centered on land held by the tribe and on tribal members within the reservation. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This sovereignty includes power to legislate and tax activities on the reservation, including some activities of non members, to determine tribal membership, to regulate domestic relations among members, and exclude outsiders from entering tribal land.

The Supreme Court reiterated that efforts by a tribe to regulate nonmembers are presumptively invalid, and the limited application of the Montana exceptions places a high burden on plaintiffs, so the exceptions to the rule do not swallow the rule itself. Tribal sovereignty generally does not extend to authority over "non-Indians who come within their borders," and, generally, once tribal land is converted to this fee simple land, the tribes lose jurisdiction over it, and lose the authority to prevent the land's sale, as well as the authority to regulate the land.

As a result of these discussions, the Court held that the Longs did not have standing to sue the Bank in tribal court. The Court notes that the Montana exceptions permit tribes to regulate nonmember conduct inside the reservation that affects the tribe's sovereign interests which, according the Court, do not include the regulation of the sale of non-Indian fee land, with only

one exception, which allows a tribe to restrain particular uses of non-Indian fee land through zoning regulations. The Court maintains that the distinction between the sale of land and conduct on the land is a well-established difference in its precedent, and "entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers" by virtue of the tribal incorporation into the United States. In response to the dissent's questions as to why internal regulations are permissible under *Montana*, but regulating the sale of fee land is not, the Court responds that fee land owned by nonmembers has already been alienated from the tribal trust, and, therefore, its regulation cannot be justified by "reference to the tribe's sovereign interest."